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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

COLLEGE SAVINGS BANK,

Petitioner,

v.

FLORIDA PREPAID POST SECONDARY EDUCATION EXPENSE BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

No. 98-149

COLLEGE SAVINGS BANK,

Petitioner,

v.

FLORIDA PREPAID POST SECONDARY
EDUCATION EXPENSE BOARD,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

BRIEF OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

The Regents of the University of California ("the University") respectfully submits this brief *amicus curiae* in support of respondent in this case. Petitioner and respondent have consented to the filing of this brief.[1]

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[1] Correspondence reflecting the parties' consent has been lodged with the Clerk. Pursuant to Rule 37.6, the University states that no counsel for any petitioner or respondent authored this brief in whole or in part. Nor did any person or entity, other than the

INTEREST OF *AMICUS CURIAE*

The University is an arm of the State of California and as such is entitled to assert an Eleventh Amendment immunity in private party suits against it in federal court. *See Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1980); *BV Engineering v. Univ. of Cal., Los Angeles*, 858 F.2d 1394, 1395 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989); *see also Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997).[2]

The University has a substantial interest in the issue presented in this case as to whether the respondent, a state agency, waived its Eleventh Amendment immunity under the constructive consent doctrine set forth in *Parden v. Terminal Ry.*, 377 U.S. 184 (1964). Under that doctrine, as qualified by subsequent decisions, a state entity can be deemed to have waived its Eleventh Amendment immunity merely by engaging in activities that are the subject of federal authority under the Constitution, if an Act of Congress has clearly specified this consequence of state activity. Petitioner and the United States have urged the Court to reaffirm this doctrine and to apply it to subject respondent to suit in federal court by reason of its having maintained a tuition-prepayment program to foster educational opportunities at state colleges and universities.

University, make a monetary contribution to the preparation or submission of this brief.

[2] The legal status of the University within the structure of the State of California government is more specifically explained in the brief *amicus curiae* in support of the petition for a writ of certiorari submitted in the companion case of *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank and United States of America*, No. 98-531.

The University of California's mission is to "provide undergraduate and graduate instruction in the liberal arts and sciences and the professions." Cal. Educ. Code § 66010.4(c) (1988). It carries out this mission through eight general campuses and a ninth devoted to the health sciences. Its functions embrace many activities that are the subject of federal legislation, and a number of the relevant federal statutes contain provisions that could, under an implied waiver theory, subject state entities to suit in federal court. The resolution of the constructive waiver issue presented in this case will therefore have a major impact on the amenability of the University to suit in federal court in respect of a broad range of its activities.[3]

Further, the University is a party to a suit, *Regents of the University of California v. Genentech, Inc.*, No. 98-731, *petition for writ of certiorari pending*, which presents a related question of whether, by securing a patent and acting to enforce it, the University has waived its immunity from suit in federal court for a declaratory judgment as to the validity and applicability of its patent. Disposition of the constructive waiver issue in this case will likely have a significant impact on the waiver issue presented in the University's pending case.

The University believes that the constructive waiver doctrine, as set forth in the *Parden* case and as advocated in the briefs of petitioner and the United States in this case,

[3] The University also has a substantial interest in the first question presented for review—whether Congress has the power under Section 5 of the Fourteenth Amendment to abrogate the immunity of state entities from suit to redress alleged unfair competition under the Lanham Act. The University has addressed the question of Congress' authority to abrogate under Section 5 of the Fourteenth Amendment in a brief *amicus curiae* submitted in the companion to this case, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank and United States*, No. 98-531.

represents an unwarranted judicial expansion of the authority to subject state entities to federal court jurisdiction that if sustained would seriously erode the structure of the federal system and the sovereign position of States in that structure. It offers this *amicus* brief to assist the Court in determining whether *Parden's* theory of constructive waiver has any place in this Court's Eleventh Amendment jurisprudence.

SUMMARY OF ARGUMENT

The theory of implied waiver adopted by the Court in *Parden v. Terminal Railway*, 377 U.S. 184 (1964), represents an aberration in Eleventh Amendment jurisprudence that cannot be reconciled with the federal structure embodied in the Constitution. The Court has traditionally recognized that, consistent with the federal framework, there are three ways in which a State's Eleventh Amendment immunity can be overcome: (1) where a State expressly waives its immunity from suit in federal court; (2) where a State affirmatively invokes the jurisdiction of the federal courts; and (3) where Congress has validly abrogated the State's immunity pursuant to its authority under the Fourteenth Amendment or other Amendments that expressly alter the federal structure. Each of these exceptions to immunity has been carefully described and cabined in keeping with the federalism principles reflected in the Eleventh Amendment and elsewhere in the Constitution.

The theory that a State's immunity from suit in federal court can be impliedly waived through state activities, by contrast, is practically boundless, and if fully embraced, would all but obliterate the three limited exceptions to Eleventh Amendment immunity that the Court has endeavored to describe. *See, e.g., Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). Petitioner and the United States both attempt to make the constructive waiver doctrine

more palatable by limiting it to a subset of state activities, and to that effect advance distinctions between "traditional" state functions (which would not be subject to implied waiver) and those that are "voluntary" (which would be). This Court's prior experience with these sorts of distinctions demonstrates why they must be rejected. The Court has twice attempted to apply such distinctions, outside of the Eleventh Amendment context, and both times ultimately concluded that the effort was "unsound in principle and unworkable in practice" on the ground that any distinction that purports to categorize state governmental functions and accord them different treatment under the Constitution is not "faithful to the role of federalism in a democratic society." *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 546-47 (1985). The same conclusion is inescapable here, because all state activity represents choices made by government bodies to advance public ends.

Likewise, the argument that a State must be deemed to have waived its immunity when it engages in "voluntary" activities because it is then competing with private companies fails to appreciate the decisive differences between States and private market participants. Even when they are acting in the commercial marketplace, States have different motivations, different constituencies, and different obligations than their private counterparts. They do not enter the marketplace as competitors seeking an advantage but as sovereigns serving the public interest, and the Eleventh Amendment appropriately treats them as such.

ARGUMENT

I. THE DOCTRINE OF CONSTRUCTIVE WAIVER IS NOT IN KEEPING WITH THE FEDERAL STRUCTURE EMBODIED IN THE CONSTITUTION.

This case presents the fundamental question of whether Congress has the authority to provide that specified state conduct—*i.e.*, engaging in activities that are within the ambit of federal legislation—will subject a State to a suit in federal court that would, but for the congressional enactment, be barred by the Eleventh Amendment. Thirty-five years ago, the Court found the existence of such congressional authority in *Parden v. Terminal Railway*, 377 U.S. 184 (1964). Since that time, the *Parden* doctrine has rarely been followed and has been significantly pared back. After this Court's recent clarification that Congress's authority to abrogate a State's immunity is limited, in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the federal courts have expressed doubt as to the continued vitality of the *Parden* principle but have been hesitant to declare it implicitly overruled without further instruction from this Court.[4]

The University urges the Court to take this opportunity to inter the aberrant doctrine of constructive waiver of state Eleventh Amendment immunity, as exemplified by the

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[4] *See Abril v. Commonwealth*, 145 F.3d 182 (4th Cir. 1998) (whether *Parden* doctrine of implied waiver survives *Seminole Tribe* is "a matter not wholly free of doubt"); *Close v. New York*, 125 F.3d 31, 40 (2d Cir. 1997) ("[I]f we were to recognize constructive consent every time a State acted in a field regulated by Congress, we would vitiate the very premise upon which *Seminole* was decided."); *cf. Chavez v. Arte Publico Press*, 157 F.3d 282, 287 (5th Cir. 1998) (holding that a "fair reading" of *Seminole* "inescapably suggests" that *Parden* has been overruled), *rehearing en banc granted*, (5th Cir. Oct. 1, 1998).

Parden line of cases, and to reaffirm that it has "no place" in Eleventh Amendment jurisprudence. *See Edelman v. Jordan*, 415 U.S. 651, 673 (1974).

A. States May Be Sued in Federal Court Only When They Expressly Agree to Submit to Federal Court Jurisdiction, or Where Congress Validly Acts to Abrogate Their Immunity.

The Eleventh Amendment, adopted to overturn this Court's early decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), was intended to reaffirm important foundation principles of the Constitution—*i.e.*, that the federal government was to co-exist with the several States, and that each was vested with attributes of sovereignty, one of which is that it is not within the power of citizens to sue the sovereign absent its consent. *See generally Seminole Tribe*, 517 U.S. at 58-68. This principle has been modified as a result of intervening amendments to the Constitution, primarily the so-called Civil War amendments, which represent a partial surrender of state sovereignty in order to enhance the "more perfect union" of the several States. One aspect of that surrender was to enable the national government, acting through the Congress, to subject States to federal court suit. *Id.* at 65-66.

Within this framework, this Court has traditionally recognized three ways in which the prohibition on citizen suits against States in federal courts can be overcome.

1. The first way is by express waiver of sovereign immunity. But because of its significance, the Court requires that the act of waiver be "unequivocal." *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985). General waiver-of-sovereign-immunity legislation will not suffice; the legislation must specifically provide for waiver of immunity from suit in federal court. *See, e.g., id.* at 241; *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99

n.9 (1984); *Florida Dep't of Health and Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54-55 (1944).

Moreover, it must be clear from state law that the State has acted officially to waive its immunity. In the absence of legislation, an express waiver by a state official will be honored only where it is clear from the "general policy of the state as expressed in its Constitution, statutes and decisions" that the authority to waive has been conferred on the person seeking to exercise it. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 467 (1945). Consonant with the teaching of the *Ford Motor Co.* case, the courts of appeals have consistently required a clear expression in state law of authority of particular state officials to waive the State's immunity from suit in federal court.[5]

2. A second basis for federal court exercise of jurisdiction over a State is when the State affirmatively invokes the court's jurisdiction. *See, e.g., Clark v. Barnard*, 108 U.S. 436 (1883); *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906) ("[W]here a state voluntarily becomes a party to a cause, and submits its rights for judicial determination, . . . [the State] cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment."); *see also Missouri v. Fiske*, 290 U.S. 18, 20, 28 (1933).

But even in these cases, the authority of the federal court to adjudicate issues affecting a State is limited to those arising out of the matter as to which the State has invoked

[5] *See, e.g., In re Creative Goldsmiths*, 119 F. 3d 1140 (4th Cir. 1997), *cert. denied sub. nom. Schlossberg v. Maryland Comptroller of the Treasury*, 118 S. Ct. 1517 (1998); *Freimanis v. Sea-Land Service, Inc.*, 654 F.2d 1155 (5th Cir. 1981); *Estate of Porter v. Illinois*, 36 F.3d 684 (7th Cir. 1994); *Silver v. Baggiano*, 804 F.2d 1211, 1214-15 (11th Cir. 1986).

the court's jurisdiction. *See WJM, Inc. v. Massachusetts Dep't of Pub. Welfare*, 840 F.2d 996 (1st Cir. 1988). In effect, the federal court's authority is limited to adjudicating compulsory counterclaims in the nature of recoupment. *See United States v. Mottolo*, 605 F. Supp. 898, 910-911 (D.N.H. 1985); *New York v. City of Johnstown*, 701 F. Supp. 33, 37 (E.D.N.Y. 1988); *United States v. Montrose Chem. Corp. of Cal.*, 788 F. Supp. 1485, 1492-93 (C.D. Cal. 1992).

3. A third basis for a citizen suit in federal court against a State derives from the authority of Congress under the Thirteenth and Fourteenth Amendments to enact legislation to enforce the prohibitions against state action contained in those amendments. Similar authority is contained in the Fifteenth, Nineteenth, Twenty Fourth and Twenty Sixth Amendments, all of which proscribe state actions that would impact on citizens' right to vote. These amendments represent modifications to the system established by the original Constitution, for they limit the sovereign powers of States insofar as those powers might otherwise be exercised in a manner inconsistent with the national policies established in the amendments. The limitation on state sovereignty includes the authority of Congress to subject States to federal court jurisdiction. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

Here again the Court's decisions confine the operation of this power. To begin with, the congressional intention to abrogate state immunity must be unmistakably clear. *See Seminole Tribe*, 517 U.S. at 55-56; *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). Mere indications of such intent in legislative history or otherwise fall well short of the required clarity. *Dellmuth v. Muth*, 491 U.S. 223 (1989).

Moreover, the exercise of enforcement power must represent a legitimate effort to protect against the constitutional deprivation that the particular amendment is

meant to proscribe. In the Fourteenth Amendment context, this Court's decision in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), establishes parameters for the exercise of congressional power to enforce the prohibition on state action denying persons the equal protection of the law or depriving them of life, liberty or property without due process of law.[6] The Court's opinion emphasizes that the power is confined to protecting existing constitutional rights and does not extend to the creation of new rights or the expansion of existing ones. The standards of congruence and proportionality applied in that case prevent the Section 5 enforcement power from becoming a roving commission to exercise authority not conferred on the Congress by Article I of the Constitution and not ceded by the States when they ratified the Civil War Amendments. *City of Boerne*, 117 S. Ct. at 2174.[7]

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[6] This *amicus* brief does not cover the other question presented in this case—whether the abrogation provision in the Lanham Act can meet the *City of Boerne* standard in the context of the unfair competition claims alleged against the Florida agency. The University has submitted an *amicus* brief in the companion case to this case (*Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank and United State of America*, No. 98-531) that sets forth its views that Congress cannot invoke its authority to abrogate state immunity under the Due Process Clause in the absence of evidence that States are not providing adequate process to redress state deprivation of constitutionally-protected property interests.

[7] There is one other route to obtain federal court adjudication of federal issues involving States. That is an injunction action against state officials (but not the State itself) to prevent continued actions found to violate constitutional or statutory limitations on state action. *See Ex Parte Young*, 209 U.S. 123 (1908); *Edelman v. Jordan*, 415 U.S. 651 (1974).

B. The Constructive Waiver Doctrine Is Not Consistent with Federalism Principles.

The *Parden* decision, acknowledged by its author to resolve an issue of first impression (*see Employees v. Missouri Dep't of Pub. Health*, 411 U.S. 279, 299 (1973) (dissenting opinion of Brennan, J.)), permitted employees of the State of Alabama to pursue a suit against the State under the Federal Employees Liability Act ("FELA") in federal court. Subsequent applications of the *Parden* rule considered by this Court have also involved suits by employees against state agencies. *See Employees v. Missouri Dep't of Pub. Health*, *supra* (suit for overtime pay under the Fair Labor Standards Act); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (suit under the Rehabilitation Act for reinstatement and back pay); *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468 (1987) (suit by employee under the Jones Act).

The *Parden* rule, as modified by later decisions, finds a constructive waiver of sovereign immunity when a State chooses to maintain activities in the face of an unequivocal provision in a federal statute that States will be subject to federal court suits under the statute to the same extent as private parties.[8] The court below derived from *Employees v. Missouri Dep't of Pub. Health* the additional requirement that the activity with respect to which the State is being sued not be an important or a core government function.

The *Parden* rule, as originally conceived and as it has been narrowed, is not faithful to the constitutional structure in general or to the Eleventh Amendment in particular. To begin with, the notion of constructive or implied waiver has

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[8] The specific holding in *Parden* is no longer governing law, given that the FELA does not contain an unequivocal waiver provision that the later cases have found to be a *sine qua non* of the constructive waiver doctrine. *See Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991).

no grounding in actual fact. There is no reason to believe that in any of the cases in which the *Parden* rule has been applied, the State or state agency in question knowingly consented to being sued in federal court under the various federal regulatory statutes that were invoked in those cases. In analogous circumstances, neither this Court nor, to our knowledge, any federal court has accepted a contention that the federal government has constructively or impliedly waived *its* immunity from suit. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980) ("A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'"), quoting *United States v. King*, 395 U.S. 1, 4 (1969).

Moreover, the notion of implied waiver cannot be reconciled with this Court's repeated holdings that state Eleventh Amendment immunity can be expressly waived only where there has been an unequivocal legislative enactment that specifically references federal court actions, or evidence that the official purporting to waive the State's immunity in the context of a particular federal court case is specifically authorized to do so under state law (constitution, statute or judicial decision). *See supra* pp. 6-7. Those holdings derive from a recognition that a constitutionally-protected right ought not be deemed waived unless there is a high degree of certainty that such a significant action was intended. No such certainty is possible in the implied waiver context. To the contrary, in the absence of express statutory waiver by the State, a better "implication" is that no willingness to be subjected to suit in federal court was ever intended.

The brief of the United States acknowledges the inappropriateness of implying a waiver of constitutionally-protected immunity when a State is carrying out normal state functions, even in the face of an Act of Congress containing an abrogation or waiver clause. But it argues that such conduct can amount to a "truly voluntary" waiver if the

"conduct in question involves activities that the State can realistically choose to abandon." Brief for the U.S., p. 24. It then attempts to categorize the activity at issue in this case as "genuinely voluntary" on the basis that, even though education is an historic state function, the marketing of "investment products" is neither a traditional nor a necessary means of carrying out that function. *Id.* at 27.

The distinction sought to be drawn between traditional state functions and those that are "genuinely voluntary" and thus "realistic" candidates for abandonment is devoid of any constitutional underpinning that would sustain the implied waiver doctrine. Certainly, there is nothing in the text or context of the Eleventh Amendment to support the notion that a State may impliedly waive the protections of that amendment when it engages in certain types of federally-regulated activities, but not in others. Nor is the distinction urged one that has any currency in other areas of constitutional law that might reasonably be imported into the Eleventh Amendment. To the contrary, outside of the Eleventh Amendment, variations on the traditional/voluntary distinction urged by the United States have twice before been expressly rejected by the Court as a means of determining the applicability of constitutional provisions to state activities. The Court's prior experience with the type of distinction urged by the United States demonstrates that it is both "unsound in principle and unworkable in practice." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

The Court first considered the type of distinction advanced by the United States in the area of state immunity from federal taxation. In *South Carolina v. United States*, 199 U.S. 437 (1905), the Court held that state immunity from federal taxation extended only to the "ordinary" and "strictly governmental" instrumentalities of state governments and not to instrumentalities "used by the State in the carrying on of an ordinary private business." *Id.* at 451, 461. The

reasoning for making such a distinction was remarkably similar to that pressed by the United States here, *i.e.*, that a State that "chooses to go into the business of buying and selling commodities" has also chosen to "divest[ ] itself of its . . . sovereignty *pro tanto*" and is thus subject to the taxing power of the federal government. *Ohio v. Helvering*, 292 U.S. 360, 369 (1934). For forty years the federal courts struggled to apply the "governmental/proprietary" distinction in intergovernmental taxation before the Court rejected it altogether as "untenable." *See New York v. United States*, 326 U.S. 572, 583 (1946) (opinion of Frankfurter, J., joined by Rutledge, J.); *id.* at 586 (Stone, C.J., concurring, joined by Reed, Murphy, and Burton, JJ.); *id.* at 590-96 (Douglas, J., dissenting, joined by Black, J.).

The governmental/proprietary distinction was next applied in the area of state immunity from federal regulation. In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court held that, by virtue of the Tenth Amendment, the Commerce Clause did not empower Congress to enforce the minimum-wage and overtime provisions of the Fair Labor Standards Act against the States "in areas of traditional governmental functions." *Id.* at 852. But eight years later, in *Garcia*, the Court again concluded that "neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society." 469 U.S. at 546-57. The Court went on to explain that:

> [t]he essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be. Any rule of state immunity that looks to the 'traditional,' 'integral,'

> or 'necessary' nature of governmental functions inevitable invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes . . . . [T]he States cannot serve as laboratories for social and economic experiment, *see New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), if they must pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands.

Id. at 546.

The distinction urged by the United States in this case is equally unworkable and unsound, because there is no principled way to categorize state activities in the way the federal petitioners suggest. States are representative governments that undertake their activities based on determinations by legislative and/or executive officials that the interests of the State and its citizens will be advanced by doing so. Whether the subject area of state activity is law enforcement, education, welfare, or transportation, any particular manner of exercising sovereign power will always represent a governmental "choice" that can at some level be described as "voluntary" and therefore an implied waiver of immunity.

For example, one State may choose to promote college attendance of its citizens by providing for modest tuition costs at state institutions (a policy followed by the University of California for many years, to the immense advantage of countless thousands of Californians). Another, like Florida, may choose to offer investment vehicles to allow parents to provide in advance for the tuition costs of their children. Another choice might be an expansive scholarship program, based on need, or on performance, or on demonstrated talent or potential. Scholarships and tuition subsidies might be

financed by state general revenues or by university-related activities such as publishing or the license of patents resulting from research activity. Any one of these choices might conceivably be abandoned, but that is not a basis for categorizing the state function—in this example, promotion of education—as so different from others as to warrant a lesser degree of Eleventh Amendment protection.[9]

The United States brief attempts to justify its proposed distinction by comparing a state operated police force, which it says cannot realistically be abandoned, with the use of investment products to allow parents to provide for the cost of their children's college education, which the United States describes as "neither a traditional nor a necessary means of facilitating the State's educational mission." Brief for the U.S., pp. 26, 27. With all respect, the example demonstrates why the proposed distinction is meaningless. In fact, few if any States operate "traditional" police forces (though they typically operate highway patrols, anti-drug task forces, or the like). Many States do provide support for locally operated police forces, however, and that support can come in various forms. Is the provision of technical assistance by a cadre of state employees an activity that the State could "realistically choose to abandon," such that the State waives its Eleventh Amendment immunity if, for example, it maintains the activity in the face of a provision in the federal Fair Labor Standards Act that purports to authorize suits by state employees against state agencies? The *choice* of how to aid local police efforts is no different, for Eleventh Amendment purposes, from the *choice* of how to provide for the higher education of state youth. The fact that each

[9] Similarly, application of a State's immunity from federal court suit cannot be made to turn on a judicial assessment of the "importance" of the particular state function. Even the petitioner acknowledges that "virtually any activity undertaken by a state could be interpreted as assisting some function deemed to be important to a state government." Pet'r Br., p. 41.

choice could be abandoned does not warrant a conclusion that its selection is intended to waive the constitutional immunity from federal court that all States possess.

The "traditional/voluntary" distinction may have a superficial appeal, as evidenced by the Court's previous attempts to apply it in the areas of intergovernmental tax immunity and federal regulation of state activities. But, the Court ultimately recognized that these attempts were fundamentally flawed and that the States' "residuary and inviolable sovereignty" is to be protected not by judicial linedrawing reflecting "predetermined notions of sovereign power," but rather in "the structure of the Federal Government itself." *Garcia*, 469 U.S. at 550 (citation omitted). In the context of the Eleventh Amendment, the structure of the Constitution recognizes a state sovereign immunity from suit in federal court that is not limited to subject matter and which acts to expressly limit Congress's Article I powers. The parsing of state activities advocated by the United States, whether by congressional enactment or by judicial decision, should be rejected as inconsistent with the structure of the Constitution and the Eleventh Amendment's express limitations on federal authority.

II. CONSTRUCTIVE WAIVER CANNOT BE JUSTIFIED BY ANALOGIZING STATES TO PRIVATE ENTITIES.

A. States Are Not Equivalent to Private Market Participants.

The United States brief seeks to justify the constructive waiver doctrine by analogizing States to private market participants. As argued by the United States,

> [w]hen a State chooses to operate a commercial enterprise of a sort traditionally run by private persons, the Eleventh Amendment does not entitle it to invoke its status as a State to gain a competitive

> advantage. . . . Having chosen to operate a commercial enterprise well removed from the State's traditional sphere, Florida Prepaid should not be permitted a constitutional exemption from the restrictions that bind its competitors.

Brief for the U.S., p. 29. Petitioner makes the same argument. Pet'r Br., p. 39.[10]

Arguments along these lines fail to appreciate the decisive differences between States and private market participants even where a State's activities place it in a position of possible competition with private entities. Those differences demonstrate why it is inappropriate to withhold Eleventh Amendment immunity from States with respect to these categories of activities.

A State acts to advance the public interest, as it is perceived by state legislators and by administrators responsible for executing state laws and operating state programs. That is fundamentally different from the profit motive that drives the typical private market competitor. The private participant's decision to remain in the market turns on business considerations and alternative opportunities. By contrast, the State's market participation decisions derive from its mission to serve the needs of its citizens.

Because States act for the public interest, they make all kinds of choices that have no equivalent in the private sector.

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[10] Similar rationales have been accepted by some lower courts that have refused to honor a State's immunity from suit in federal court. For example, in the companion to this case, the Federal Circuit Court of Appeals stressed that the abrogation of state immunity from suit in the patent context satisfied the *City of Boerne* standard because it merely subjected States to the same civil remedies that are applicable to their private market competitors. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 148 F.3d 1343 (Fed. Cir. 1998).

For example, as market participants, States might restrict their sales to in-state buyers, even though a rational seller would look for the buyer willing to pay the highest price. *See Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). They might hire only in-state employees, although a rational employer would look for the cheapest labor force. *See White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983). And they might choose to purchase only from in-state companies, even though a rational business would impose no such restriction. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Because the Court held in each of these cases that the Commerce Clause did not prohibit a State acting in the marketplace to favor in-state interests, the United States cites them for the proposition that the States should be subject to the same "terms of engagement" as private firms. Brief for the U.S., p. 30. The more appropriate conclusion is that even when States act as market participants, their actions still reflect their status as representative governments, not private competitors.

The fallacy of the United States' suggestion that the implied waiver doctrine must be recognized in order to "level the playing field" between state governments and private companies is also evident in the Court's decision in *Employees v. Missouri Dep't of Pub. Health, supra,* which was decided after *Parden* and which substantially limited its scope. Certainly, the principal area in which the States uniformly "compete" with private companies is the labor market—and yet the Court in that case concluded that Missouri had not impliedly waived its Eleventh Amendment immunity from a suit for overtime pay under the Fair Labor Standards Act ("FLSA") simply by hiring employees. 411 U.S. at 285-87. Thus, the State was not subject to suit in federal court for failure to pay overtime, even if a private employer would be.

Would not immunity from suit in a federal forum give a State a competitive advantage over private companies with

respect to its labor costs? Even assuming that an FLSA suit could not be brought in state court, *cf. Alden v. Maine*, No. 98-436, the answer is: not likely. A State is a sovereign government responsible to its citizenry, and its role as employer is therefore fashioned by considerations not necessarily relevant to a private employer. Because they are governments, States generally impose upon themselves open records laws and other public obligations that would be inconceivable to private, profit-making entities. State decisionmakers may also determine that the public interest demands that they offer their employees more secure job tenure, or health insurance and other benefits not uniformly offered in the private sector.

Moreover, a State faces constitutional constraints that are not visited upon private parties. For example, a public employer such as a State must be cognizant of First Amendment concerns in dealing with its employees and contractors, while a private party does not. *See Board of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). States may likewise owe due process protections to their employees and business partners, while private parties do not. *See Perry v. Sindermann*, 408 U.S. 593 (1972); *Cleveland Bd. of Educ. v. Loudermill*, 391 U.S. 563 (1968). The Constitution therefore does not establish or require "evenhandedness" between States and private parties but, recognizing the unique status of the former, imposes obligations and grants immunities not applicable to private parties.

These differences between representative state governments and private actors underscore the lack of a valid constitutional underpinning to the implied waiver doctrine. Contrary to the United States' argument, a State's decision to enter the commercial marketplace does not mean that it will act like a commercial entity, and therefore must be treated like one. States have different motivations, different constituencies, and different obligations than their private

counterparts. They do not enter the marketplace as competitors seeking an advantage but as sovereigns serving the public interest, and the Eleventh Amendment treats them accordingly.

B. Implied Waiver is No Different Than the Abrogation Power Rejected in *Seminole Tribe*.

Because all state activity represents choices made by government bodies to advance public ends, there is no real distinction between the constructive waiver approach and the abrogation approach under Article I that this Court rejected in *Seminole Tribe*. This is well illustrated in the decision below, where the provision relied upon by the court to find that Congress unambiguously intended participation in an area of activity to constitute a waiver of immunity is precisely the provision that the court held to be an invalid abrogation of that immunity. *See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 363 (3d Cir. 1997). And when the unwarranted distinctions—between activities that a State can supposedly abandon and those that it cannot—are put aside, the constructive waiver doctrine is no more or less than a back door way for Congress to accomplish what *Seminole Tribe* precludes it from doing directly.

To the extent an abrogation of a Eleventh Amendment immunity can be justified under the Fourteenth Amendment, it represents a *pro tanto* ceding of sovereignty by States to the national government in the interest of enhancing the "more perfect union." When that power is not available, a State's immunity from suit by a private party in federal court should be respected except in those cases where there has been a genuine and clear decision by the State not to invoke it. The constructive waiver doctrine, as it has developed in the *Parden* line of cases, has no place in this regime.

CONCLUSION

For the foregoing reasons, the University respectfully urges the Court to reject what remains of the *Parden* constructive waiver doctrine, and to reaffirm the application of Eleventh Amendment immunity except where a State has knowingly and unmistakably elected not to invoke it, or where Congress has validly abrogated it in the exercise of its enforcement power under Section 5 of the Fourteenth Amendment or similar provisions of other Amendments.

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